

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW STEWART, JR.,

Defendant-Appellant.

UNPUBLISHED

January 23, 2007

No. 262620

Wayne Circuit Court

LC No. 03-011405-01

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 10 to 30 years for the first-degree CSC conviction and 3 to 15 years for the second-degree CSC conviction. He appeals as of right. We affirm.

I. FACTS

Defendant was convicted of sexually abusing AD, the daughter of defendant's live-in girlfriend, Marcella. Marcella, AD, and Marcella's other children, Channelle, Dominique, and Malik, moved into defendant's house in 2002, when AD was eight years old. In December 2002, AD reported the sexual abuse to her aunt, Altisha. Altisha reported AD's allegations to Marcella, but Marcella did not do anything.

AD later told Altisha that defendant was continuing to abuse her sexually. Channelle and Dominique told Altisha that they saw defendant take AD into his bedroom when Marcella was away at work. Altisha thereafter contacted Protective Services and the children were briefly removed from defendant's home.

Defendant gave a statement to Detroit Police Officer Nicole LaRosa in which he denied any sexual contact with AD and denied knowing why she would accuse him. Later, however, he told Michigan State Police Trooper Valencia Jones that AD once came to his bed and began to perform fellatio on him while he was asleep. When he woke up and discovered what she was doing, he pushed her off the bed.

A child protective proceeding was initiated in family court. During the family court proceedings, AD and her siblings wrote letters to Marcella's attorney denying any wrongdoing

by defendant. AD wrote two letters in which she denied being sexually abused by defendant, and she blamed a Protective Services worker for telling her to lie. Channelle wrote a letter stating that AD told her that defendant's nephew had sexually abused AD and also told her to blame defendant. AD testified in a family court proceeding that defendant never abused her.

At defendant's criminal trial, AD testified regarding two separate occasions where defendant sexually abused her while Marcella was at work. On one occasion, defendant came into the basement, picked her up while she was asleep, and carried her upstairs to his bedroom. He put her on the bed, removed her pajama bottoms, and touched her genital area. On the second occasion, he carried her upstairs to his bedroom and forced her to perform oral sex on him. AD testified that defendant moved his penis back and forth in her mouth and "white stuff came out." According to AD, there were other incidents of abuse, including incidents involving oral sex, but she did not know how many.

AD testified that she was placed in foster care and was happy to be safe from defendant, but sad about her separation from Marcella. She stated that Marcella told her to write the letters in which she denied being sexually abused so that the family could be reunited. AD also stated that she lied when she testified in family court that she was never sexually abused by defendant. She explained that she lied because she wanted to be with her mother.

Defense counsel impeached AD with inconsistencies from her preliminary examination testimony. At the preliminary examination, AD did not testify that defendant carried her upstairs, but rather told her to come to sleep with him in his bedroom. Also, AD testified at the preliminary examination that defendant put his penis on her genitals, and that he ejaculated on her face instead of into her mouth.

AD's siblings, Channelle and Dominique, corroborated several aspects of AD's testimony. Channelle testified that there were at least two occasions when defendant carried AD upstairs or told her to come upstairs with him while Marcella was working, and that AD told her about the improper touching afterward. Channelle also testified that she once saw defendant touch AD's genital area through her underwear, when she was sleeping in the same bed with AD and defendant. Channelle also testified that Marcella told her to write the letter in which she stated that AD admitted to Channelle that it was defendant's nephew, not defendant, who forced her to perform oral sex. Channelle stated that this letter was a lie.

AD's brother, Dominique, testified that there was more than one occasion when defendant told AD to go upstairs with him when their mother was at work. On one occasion when he was upstairs, he saw defendant and AD in defendant and Marcella's bed, and AD was wearing only her underwear. He told Marcella, but she did not do anything.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to sustain his convictions because AD was not a credible witness. We disagree.

A. Standard of Review

When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

B. Analysis

Although defendant frames this issue as one challenging the sufficiency of the evidence, in substance it challenges the jury's verdict as being contrary to the great weight of the evidence. Defendant does not contend that the prosecutor failed to present evidence of each element of the charged crimes, as would be required in a challenge to the sufficiency of the evidence. *Nowack, supra* at 399. Rather, he argues that the jury's verdict cannot stand because AD's testimony cannot reasonably be believed, considering that she previously wrote letters recanting her allegations, testified in family court that defendant did not sexually abuse her, and gave inconsistent accounts of the details of the assaults when she testified at the preliminary examination. Claims involving lack of witness credibility do not establish the insufficiency of the evidence, because this Court defers to the jury's assessment of the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

To the extent that defendant's argument challenges the great weight of the evidence, it lacks merit. In reviewing a claim that a verdict is against the great weight of the evidence, the appropriate test "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001), lv den 466 Mich 873 (2002). A court may not act as a "thirteenth juror" when deciding a motion for a new trial, and this Court "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998), lv den 459 Mich 994 (1999). In *Lemmon, supra* at 625, our Supreme Court recognized only narrow exceptions to the general principle against granting a new trial based on questions of witness credibility, e.g., when witness testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. *Id.* at 643-644. "[I]f 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Id.* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

Here, AD's testimony was not inherently implausible or patently incredible. The prosecutor presented ample evidence that AD's earlier recantations and inconsistent testimony were made under duress. Two of AD's siblings corroborated key aspects of her testimony. Although defense counsel impeached AD with some discrepancies from her preliminary examination testimony, the jurors could reasonably find that these discrepancies did not cast doubt on her credibility. Defendant has not established that the jury's verdict is against the great weight of the evidence.

III. SCORING OF OFFENSE VARIABLES (OV) 4 & 13

Defendant next argues that the trial court erred in scoring OV 4 and OV 13 of the sentencing guidelines. Again, we disagree.

A. Standard of Review

We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

B. Analysis

The trial court scored ten points for OV 4. MCL 777.34(1)(a) provides that ten points should be scored for OV 4 if the victim suffers "[s]erious psychological injury requiring professional treatment." MCL 777.34(2) provides that "the fact that treatment has not been sought is not conclusive." Defendant's foster care worker, Anita Pace, testified at the sentencing hearing that the family court judge ordered counseling for AD because of the sexual abuse. Defendant does not challenge the accuracy of this information, but only asserts that it was "double hearsay." The basis for this contention is not clear. In any event, it is immaterial whether the information was based on hearsay because the rules of evidence do not apply at sentencing. MRE 1101(b)(3). Defendant does not challenge the accuracy of the information that counseling was ordered for AD because of the sexual abuse, and this evidence supports the score of ten points for OV 4. Therefore, we uphold the trial court's scoring decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial court also scored 25 points for OV 13. MCL 777.43(b)¹ provides that 25 points should be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." The trial court found three offenses based on the two incidents for which defendant was convicted, plus the incident that Channelle witnessed. Defendant argues that it was not clear that the incident witnessed by Channelle was not one of the two conviction offenses. However, AD testified that defendant placed his penis in her mouth "[m]ore than one time." Therefore, because there was evidence of at least two incidents of oral sex in addition to the fondling incident that led to defendant's second-degree CSC conviction, we conclude that the evidence supports the trial court's 25-point score for OV 13.

IV. SENTENCING GUIDELINES

Finally, we reject defendant's argument that the trial court erred in scoring the sentencing guidelines based on facts not found by the jury.

A. Standard of Review

The correct application of statutory sentencing guidelines is a question of law that we review de novo. *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005).

B. Analysis

¹ According to the information, defendant's offenses were committed between January 2002 and June 2003. Although MCL 777.43 was amended, effective December 26, 2002, the amendments apply only to offenses involving controlled substances and, therefore, do not affect this case.

Defendant relies on the United States Supreme Court's decisions in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Defendant maintains that these cases prohibit a sentencing court from increasing a defendant's *maximum* sentence based on facts not found by a jury. However, our Supreme Court has held that these decisions do not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is fixed by statute, and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). Thus, we reject this claim of sentencing error.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette